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No. 93-1569

In the Supreme Court of the United States

OCTOBER TERM, 1993

REGENER LEVON BOARDS AND BRENDA SUE STEELE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners violated 42 U.S.C. 1973i(c), which makes it a crime to provide false information as to one's name for the purpose of establishing eligibility to register or vote, by completing absentee ballot applications in the names of other registered voters.

2. Whether sufficient evidence supported petitioner Boards' convictions on one of the substantive Section 1973i(c) counts and for conspiring to violate Section 1973i(c).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Bayer*, 331 U.S. 532 (1947)	9
United States v. *Felix*, 112 S. Ct. 1377 (1992)	9
United States v. *Horton*, 921 F.2d 540 (4th Cir. 1990), cert. denied, 111 S. Ct. 2860 (1991)	7
United States v. *Olinger*, 759 F.2d 1293 (7th Cir.), cert. denied, 474 U.S. 839 (1985)	8

Statutes:

18 U.S.C. 371	2, 8
42 U.S.C. 1973	4, 7
42 U.S.C. 1973i(c)	2, 3, 4, 5, 6, 7, 8, 9
42 U.S.C. 1973*l*(c)(1)	4, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-24) is reported at 10 F.3d 587. The opinion of the district court (Pet. App. 1-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1993. The petition for rehearing was denied on January 4, 1994. Pet. App. 25-26. The petition for a writ of certiorari was filed on April 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners Boards and Steele were found guilty of giving false information as to their names in order to establish eligibility to vote, in violation of 42 U.S.C. 1973i(c). In addition, Boards was found guilty of conspiring to commit that offense and to vote more than once, in violation of 18 U.S.C. 371. Following the verdicts, petitioners moved for judgments of acquittal. The district court acquitted Boards on three of the four false information counts, and acquitted Steele on all three false information counts. Pet. App. 1-17. Boards was sentenced to six months' imprisonment. The court of appeals reinstated the jury's verdicts as to both petitioners on the acquitted counts, and it affirmed Boards' convictions on the remaining two counts. *Id.* at 18-24.

1. The evidence showed that petitioners engaged in a fraudulent scheme to vote absentee ballots in the November 1990 general election in Phillips County, Arkansas, for seats in the United States Senate, the United States House of Representatives, and the state legislature. Pursuant to the scheme, petitioners completed absentee ballot applications in the names of other registered voters. Boards then forged the voters' signatures on some applications. Steele marked some applications with X's even though the voters were able to sign their own names. Without the authorization of the voters, petitioners directed in the applications that the county clerk send the absentee ballots to a post office box. That box was controlled by the candidate for whom petitioners were

working. Again without the knowledge or permission of the voters, the absentee ballots were then voted in favor of petitioners' candidate and returned to the county clerk's office, along with voter statements containing signatures forged by Boards and others. Pet. App. 19-20.

2. Following the guilty verdicts, the district court granted petitioners' motions for judgment of acquittal on several of the substantive counts under 42 U.S.C. 1973i(c). That statute prohibits "knowingly or willfully giv[ing] false information as to [one's] name * * * for the purpose of establishing [one's] eligibility to register or vote." In granting the acquittals, the court concluded that petitioners did not violate Section 1973i(c) because (1) the statute applies only to registering and voting, not to applying for an absentee ballot, Pet. App. 10-11; (2) petitioners did not provide false information as to the "names" of the registered voters—that is, they used the names of real registered voters instead of inventing false names, *id.* at 12-14; and (3) they did not complete the absentee ballot applications for the purpose of establishing their own eligibility to vote, but rather, to allow their candidate to cast fraudulent votes, *id.* at 12. In addition, the court found that the evidence was insufficient to establish that Steele filled out the absentee ballots with the intent of having them voted by anyone other than the lawfully registered voter. *Id.* at 6.

The district court upheld the guilty verdicts against Boards on the conspiracy count, Pet. App. 7, and one of the Section 1973i(c) counts, Pet. App. 15-16. The evidence on that substantive count showed that, after receiving an absentee ballot requested in the

name of Harry Shears, Boards actually voted the ballot in the election. In those circumstances, the district court concluded, the jury could find that Boards "willfully gave false information as to her name by representing that she was Mr. Shears in order to establish her (Board's) [*sic*] eligibility to vote Mr. Shears' absentee ballot." *Id.* at 16.

3. Both the government and Boards appealed. The court of appeals agreed with the government that the district court erred in granting the motions for judgment of acquittal. First, the court held that Section 1973 covers absentee ballot applications. The court reasoned that an absentee ballot application is a "vote" within the meaning of the statute because "an absentee voter must first apply for an absentee ballot as a 'prerequisite to voting.'" Pet. App. 21, quoting 42 U.S.C. 1973*l*(c)(1) (defining term "vote").

Next, the court of appeals rejected the district court's conclusion that a person using a real voter's name on a fraudulent ballot application does not violate Section 1973i(c). Pet. App. 21-22. The court explained that

> [t]here is no dispute that a person who "gives false information as to [the person's] name . . . for the purpose of establishing [the person's] eligibility to . . . vote" violates § 1973i(c). This is exactly what [petitioners] did. Because only registered voters are eligible to apply for and vote absentee ballots, the use of real registered voters' names was essential to the scheme to obtain and fraudulently vote absentee ballots for [petitioners'] candidate. Obviously, [petitioners] could not get the absentee ballots of other real voters by using their own names on the applications. Thus, [petitioners]

> "[gave] false information as to [their] name[s]" when they falsely used the names of real registered voters to apply for absentee ballots.

Ibid., quoting 42 U.S.C. 1973i(c).

The court of appeals also rejected the district court's conclusion that petitioners did not violate Section 1973i(c) because their purpose in seeking the absentee ballots was not to enable themselves to cast fraudulent votes. Pet. App. 22. The court held that petitioners could be held liable, as aiders and abettors, for facilitating their candidate's voting of the fraudulently obtained absentee ballots. *Ibid.*

The court of appeals disagreed with the district court's finding that the evidence failed to show that Steele intended to deprive the registered voters whose names were used of their ballots. Pet. App. 22-23. The court held that the jury properly could reject Steele's testimony that she was trying to help the voters obtain absentee ballots and "infer from her actions that she intended someone other than the registered voters obtain and vote the ballots." *Ibid.*

Turning to Boards' appeal, the court of appeals rejected her contention that the evidence was insufficient to support the Section 1973i(c) count that the district court had upheld. The court of appeals held that "[t]he record shows ample evidence from which a reasonable jury could find Boards forged a voter's signature to a voter statement and marked the voter's absentee ballot without authorization in violation of 42 U.S.C. § 1973i(c)." Pet. App. 23. Because the court affirmed that conviction and reversed the acquittals on the other substantive counts, it concluded that it "need not address Boards' assertion that her

conspiracy conviction must rest on a substantive conviction." *Id.* at 23-24.

ARGUMENT

1. Petitioners contend that the court of appeals erred in reinstating their convictions, because 42 U.S.C. 1973i(c) does not reach fraudulently obtaining and using absentee ballots. First, they argue that the court of appeals incorrectly construed Section 1973i(c) to prohibit not only the giving of false information by a registrant as to his or her own name, but also the "use" of a registrant's name by a third party. Pet. 10-12. In addition, petitioners argue that the statute does not reach the use of false statements to obtain an absentee ballot. Pet. 12-13. These contentions are without merit.

The court of appeals reinstated petitioners' convictions under Section 1973i(c), not because they gave false information about other persons' names, but because they provided false information about their *own* names on the absentee ballot applications. Petitioners could not have obtained the absentee ballots by using their own names on the applications, nor could they have obtained the ballots by using fictitious names, because those names would not have appeared on the registration rolls. Only by falsely using the names of real individuals were petitioners able to obtain the absentee ballots. Thus, the court of appeals correctly found that petitioners provided " 'false information as to [their] name[s]' when they falsely used the names of real registered voters to apply for absentee ballots." Pet. App. 21-22. The court's holding rested on the eminently reasonable proposition that a person provides false information

about that person's own name within the meaning of the statute when, in order to obtain an absentee ballot, that person uses someone else's name instead. Petitioners' use of false names, even though the names belonged to real individuals, was the "giv[ing] [of] false information as to [their] name[s]." 42 U.S.C. 1973i(c).

Petitioners claim that Section 1973 does not reach their conduct because they did not provide the false information to establish their *own* eligibility to vote as absentees. Pet. 12. But so long as petitioners' acts were part of a scheme to enable *some* person or persons to cast the fraudulent absentee ballots, petitioners can be held liable for violating the statute. As the court of appeals concluded, "[b]ecause [petitioners] were also charged as aiders and abettors under 18 U.S.C. § 2, * * * they may be held accountable for their candidate's or an unidentified principal's acts of voting the ill-gotten absentee ballots." Pet. App. 22. See *United States* v. *Horton*, 921 F.2d 540, 543 (4th Cir. 1990) (government need not prove identity of principal in order to hold a defendant accountable as aider and abettor), cert. denied, 111 S. Ct. 2860 (1991).

Nor is there any merit to petitioners' claim that Section 1973i(c) covers only the act of providing false information for the purpose of registering or casting a vote, and that it does not extend to providing false information in order to obtain an absentee ballot. Section 1973i(c) makes it a crime to provide false information for the purpose of establishing "eligibility to register or vote." The statute defines "vote" as "includ[ing] all action necessary to make a vote effective * * *, including, but not limited to,

registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly." 42 U.S.C. 1973*l*(c)(1). The statutory definition encompasses applying for an absentee ballot, because the application is a necessary means by which an absentee voter makes his vote effective. As the court of appeals observed, "an absentee voter must first apply for an absentee ballot as a 'prerequisite to voting.'" Pet. App. 21.

United States v. *Olinger*, 759 F.2d 1293 (7th Cir.), cert. denied, 474 U.S. 839 (1985), on which petitioners rely, has no relevance to this case. There, the defendant was convicted of conspiring to cast false ballots in a general election, in violation of 18 U.S.C. 371. On appeal, he claimed that he should have been charged under the conspiracy provision of Section 1973i(c). In rejecting that claim and holding that the defendant was properly charged under Section 371, the court concluded that Section 1973i(c) was "too specific" to cover the defendant's conduct because it applies only to the act of conspiring with one other person for the purpose of encouraging that person's false registration or illegal voting. 759 F.2d at 1299-1300. Nothing in *Olinger* addresses the question whether using the names of other registered voters on absentee ballot applications constitutes a substantive offense under Section 1973i(c).

2. In the "Questions Presented" portion of the petition, Boards raises the issue of the validity of the two convictions—one on the conspiracy count and the other on a substantive Section 1973i(c) count—that survived her motion for judgment of acquittal. Boards does not explain, however, why she believes those

convictions are defective. The substantive charge involved not the filing of false applications for absentee ballots, like the other substantive charges on which the district court granted the acquittals, but Boards' actual submission of an absentee ballot and voter statement in the name of another registered voter. Both courts below correctly held that such conduct clearly violates Section 1973i(c). Pet. App. 15-16, 23.

On appeal, Boards argued that the conspiracy conviction could not stand absent a valid conviction on at least one of the substantive counts. The court of appeals did not address that claim because of its correct determination that all the Section 1973i(c) convictions were valid. Pet. App. 23-24. In any event, to be guilty of conspiracy a defendant need not commit the underlying substantive offense; the agreement to commit the offense, which is the essence of conspiracy, is "distinct from the [offense] itself." *United States* v. *Felix*, 112 S. Ct. 1377, 1384 (1992), quoting *United States* v. *Bayer*, 331 U.S. 532, 542 (1947).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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